80-415

No. _____

Supreme Court, U. S.
FILED
SEP 15 1980
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

RAILWAY LABOR EXECUTIVES' ASSOCIATION,
Appellant,

v.

WILLIAM M. GIBBONS, *Trustee,* CONTINENTAL ILLINOIS NATIONAL BANK AND TRUST COMPANY OF CHICAGO; FIRST NATIONAL BANK OF CHICAGO; HENRY CROWN, ET AL., UNITED STATES OF AMERICA; INTERSTATE COMMERCE COMMISSION; AND NEIL P. GOLDSCHMIDT, SECRETARY OF TRANSPORTATION,
Appellees.

On Appeal From The United States District Court For The Northern District Of Illinois, Sitting As A Railroad Reorganization Court

JURISDICTIONAL STATEMENT

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PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D.C.

QUESTIONS PRESENTED

In the opinion of appellant Railway Labor Executives' Association* the following questions are presented by this appeal:

1. Should this Court, as an exercise of its supervisory powers over lower federal courts, review the manner in which the District Court, without giving detailed findings of fact and conclusions of law, enjoined enforcement of an Act of Congress which Congress has declared to be essential to the preservation of uninterrupted rail transportation in a large region of the country?

2. Does Congress, after concluding that the public interest requires adequate protection of Rock Island employees, have the power to establish the terms upon which the Rock Island, a railroad in reorganization under Section 77 of the Bankruptcy Act, may withdraw its assets from the business of providing interstate rail transportation?

3. Did the District Court abuse its discretion in enjoining an Act of Congress intended to provide immediate protective benefits to needy employees of the Rock Island where there was no showing that either the estate or the creditors of the Rock Island would be irreparably harmed while the parties were complying with an Act which Congress has declared to be essential to the uninterrupted continuation of rail transportation in a large region of our country?

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* Appellant Railway Labor Executives' Association is a voluntary, unincorporated association of the Chief Executive Officers of virtualy all of the standard labor organizations which represent railroad employees. The member organizations of RLEA are listed in Appendix F, attached hereto. All other parties to this proceeding are included in the caption, and are further identified in footnote 3, *infra* at p.6.

4. Did Congress in passing the Rock Island Transition and Employee Assistance Act (RITA), intend to withdraw the remedy of the Tucker Act, 28 U.S.C. §1491, from those who claim that compliance with the directions of RITA would deprive them of property without just compensation?

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Appellees.

On Appeal From The United States District Court For The Northern District Of Illinois, Sitting As A Railroad Reorganization Court

JURISDICTIONAL STATEMENT

This case involves an appeal by the Railway Labor Executives' Association [hereinafter, "RLEA"] from a preliminary injunction issued on June 9, 1980, by the United States District Court for the Northern District of Illinois in which that court, sitting as a railroad reorganization court for the reorganization of the Chicago, Rock Island & Pacific Railroad Co. [hereinafter, "CRI" or "Rock Island"] under Section 77 of the Bankruptcy Act, 11 U.S.C. §205, enjoined the enforcement of Sections 106 and 110 of the Rock Island Transition and Employee Assistance Act [hereinafter, "RITA"], Pub. L. No. 96-254, 45 U.S.C. §1001, *et seq.*

Sections 106 and 110 of RITA, 45 U.S.C. §§1005 and 1008, provided a procedure by which Congress directed the Rock Island to mitigate the harsh consequences which the demise of that carrier was having upon its employees, and the Court preliminarily enjoined enforcement of those provisions because, in its opinion, they were unconstitutional.

OPINIONS BELOW

The District Court delivered an oral opinion when it granted the preliminary injunction on June 9, 1980. That opinion, as well as the order imposing the injunction, are not officially reported; they are attached to this pleading as Appendices B and C, respectively. On June 20, 1980, the court denied a motion by the United States to reconsider its ruling of June 9, 1980, and its unreported oral opinion is attached hereto as Appendix D.

JURISDICTION

This case involves an appeal from an interlocutory order of a United States District Court in which that court, on June 9, 1980, held portions of an Act of Congress unconstitutional, and preliminarily enjoined agencies of the federal government, as well as the Rock Island Trustee, from complying with the commands of Congress in that Act. This Court, appellant RLEA submits, has jurisdiction over this appeal under 28 U.S.C. §1252.

Appellant filed its notice of appeal on June 11, 1980, two (2) days after the preliminary injunction was issued, well within the thirty (30) day time period of 28 U.S.C. §2101(a); a copy of that notice is attached hereto as Appendix E. On August 5, 1980, this Court granted appellant an extension of time to and including September 15, 1980, in which to docket this appeal.

STATUTES INVOLVED

This appeal involves the constitutionality of two (2) provisions of RITA, *i.e.*, Sections 106 and 110, 45 U.S.C. §§1005 and 1008. Appellant has set forth both statutory provisions in Appendix A which is attached hereto.

STATEMENT OF THE CASE

Operating a railroad system in thirteen (13) states in the mid- and southwestern regions of the country which included over 10,000 miles of track and which employed in August 1979 over 8,700 employees, the Rock Island, on March 17, 1975, filed a petition with the United States District Court for the Northern District of Illinois to reorganize under Section 77 of the Bankruptcy Act, 11 U.S.C. §205. That petition was filed after the CRI had experienced several years of a deteriorating financial condition. Thereafter, the CRI continued to operate, albeit under the protection of Section 77, for more than four and a half (4½) years. But, after a lawful strike further damaged its financial posture, the Rock Island ceased all operations on its own in September 1979.

On January 25, 1980, the Trustee was ordered to liquidate the estate because the reorganization court concluded, without the benefit of a report by the Interstate Commerce Commission [hereinafter, "ICC" or "Commission"] as required under Section 77(d), 11 U.S.C. §205(d), that the Rock Island was unreorganizable.[1]

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[1] Appellant RLEA has taken an appeal from that liquidation order to the United States Court of Appeals for the Seventh Circuit (No. 80-1353) on the ground, *inter alia*, that a Section 77 reorganization court does not have jurisdiction to order or to control a liquidation of a railroad in reorganization under Section 77. *See, Ecker* v. *Western Pac. R.*, 318 U.S. 448 (1943); *Van Schaick* v. *McCarthy*, 116 F.2d 987 (10th Cir. 1941). That appeal is still pending.

Thereafter, the reorganization court began to authorize certain acts on the part of the Trustee designed to accomplish liquidation of the estate by either abandonment of lines or sales of Rock Island property to interested purchasers. On June 2, 1980, the reorganization court, asserting that since at least its liquidation order of January 25, 1980, the public interest in continuation of the Rock Island has been outweighed by the interests of the creditors in protection of their financial interests, authorized the abandonment of the entire Rock Island system, subject to a delay in abandonment of those lines which the ICC had concluded were essential to the public interest.[2] The court also refused to condition its abandonment order upon a requirement that the carrier provide protections for employees who may be affected by the abandonment, even though Section 17(a) of the Milwaukee Railroad Restructuring Act [hereinafter, "MRRA"], 45 U.S.C. §915(a), by its express terms mandated that such an abandonment order be conditioned.

Shortly after the CRI reorganization court ordered the liquidation of the Rock Island, Congress began to consider legislation to cover the Rock Island situation, including provisions to continue without interruption essential rail services then being provided under 49 U.S.C. §11125, and to assure that Rock Island employees were not left destitute by the cessation of railroad operations. *E.g.*, S. 2253, 96th Cong., 2d Sess; H.R. 6837, 96th Cong., 2d Sess. Title I of the legislation enacted and signed into law on May 30, 1980, as Public

[2] On June 9, 1980, RLEA appealed that abandonment order to the United States Court of Appeals for the Seventh Circuit (No. 80-1788). On August 4, 1980, an appeal by the United States from that order was docketed with the Seventh Circuit, No. 80-2075; those appeals are still pending.

Law No. 96-254 dealt with the Rock Island, and Sections 105 through 110 included provisions intended to assure that Rock Island employees who are unable to secure employment on a permanent basis with rail carriers purchasing Rock Island lines would not be deprived of minimum protections.

Section 106 of the Rock Island Transition and Employee Assistance Act (*i.e.*, Title I of Pub. L. No. 96-254) was patterned after Section 9 of the MRRA, 45 U.S.C. §908, and, as the House report explains:

> [P]rovides that the representative of the Rock Island Trustee and representatives of the Rock Island employees, with the assistance of the National Mediation Board, shall negotiate an employee protection arrangement within ten days of enactment. Should those negotiations prove unsuccessful, the ICC will impose, not later than 30 days after enactment, a fair and equitable arrangement no less protective of the employees than under Section 9 of the Milwaukee Railroad Restructuring Act. The employee protection payments shall be administrative expenses as they were under section 9(d) of the MRRA . . . . The ICC, in imposing protection, shall consider benefits including moving expenses, separation allowances, health insurance benefits and other benefits, subject to the $75 million limitation. Because litigation may result from this provision, the bill provides for an expedited litigation procedure.

H. Rpt. No. 96-839, 96th Cong., 2d Sess. at 22 (1980).

Congress carefully drafted the legislation to provide for an expeditious implementation of an arrangement to protect Rock Island Employees and in the Conference Report on this legislation, the conferees noted in reference to Section 106:

> This section *mandates early implementation* of employee protection to avoid disruption of rail ser-

> vice and undue displacement of employees. The conferees intend that if no agreement is reached within the initial 10-day period and the ICC prescribes an agreement, the bankruptcy court will take whatever actions are appropriate and necessary for the immediate implementation of such agreement, *so that payments to Rock Island employees will be made forthwith, notwithstanding any ensuing litigation concerning such payments. The conferees believe that legislation is essential to provide for an orderly transition.*

H. Rpt. No. 96-1041, 96th Cong., 2d Sess. at 26 (1980) (emphasis added).

After the enactment of RITA, the National Mediation Board proffered its assistance, and over the ten (10) day period scheduled several negotiation sessions. Although representatives of the Rock Island employees attended each session called by the Board, the Rock Island Trustee declined to participate. At first the Trustee asked for a postponement from June 3, 1980, to June 5, 1980, and then on June 4 informed the Board that he would not attend the forthcoming session. On June 6, 1980, the Trustee informed the National Mediation Board that in his view the Act was unconstitutional and he would not attend the next session then scheduled for June 9, 1980. On June 5, 1980, the Trustee, along with the principal creditors and shareholders of the debtor[1] filed a twenty-six (26) page Complaint with the reorganization court seeking both a judgment declaring

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[1] The First National Bank of Chicago and the Continental Illinois National Bank and Trust Company of Chicago, as indentured Trustees, and Henry Crown *et al.*, shareholders. Hereafter, the creditors and shareholders will be referred to as "creditors." The United States of America, the ICC, and the Honorable Neil Goldschmidt were named as defendants. RLEA, an intervenor in the reorganization proceeding, participated as an active party in the hearing on this matter.

the entire Act unconstitutional, and an injunction against its enforcement.

A hearing on the Trustee's and creditors' request for injunctive relief was conducted before United States District Judge Frank J. McGarr sitting as a reorganization court on June 9, 1980, and at the conclusion of that hearing the court ruled that those sections of RITA dealing with an employee protection arrangement (*i.e.*, Sections 106 and 110) were unconstitutional as depriving the estate of property for a public purpose without just compensation, and possibly becasue they were a non-uniform Bankruptcy act. The court, without making specific findings of irreparable harm except concluding that the Act was unconstitutional, issued a preliminary injunction (1) enjoining the ICC from asserting jurisdiction to consider or to impose any employee protective arrangement; (2) enjoining the Trustee from entering into negotiations with labor representatives to arrive at an agreement under RITA; and (3) enjoining Secretary of Transportation Neil P. Goldschmidt from complying with obligations imposed by Section 110(a) of the Act.

On June 18, 1980, the United States filed a motion requesting the court to reconsider its ruling of June 9, 1980, and to vacate the injunction. Appellant RLEA and the ICC supported that motion, but after hearing oral argument on June 20, 1980, the court denied that request. In doing so, the court reiterated its earlier view that Sections 106 and 110 of RITA were unconstitutional for several reasons, but specifically enumerated only one such reason—*i.e.* "any imposition of labor protection by Congress on the Rock Island payable out of the Estate was an unconstitutional taking." Tr. of June 20, 1980, at 59; Appendix D at 22a.

Appellant RLEA filed with this Court on June 21, 1980, an application for a stay of that preliminary injunction, but on June 28, 1980, Mr. Justice Stevens denied that request with a written statement. Appellant RLEA then requested reconsideration of its stay application by the full Court, and on July 2, 1980, this Court, with three (3) Justices dissenting and one (1) Justice abstaining, voted to deny that stay request.

On June 11, 1980, appellant RLEA filed its notice of appeal to this Court and this appeal has followed. The United States on July 9, 1980, also noted an appeal from the preliminary injunction.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

1. History has shown that conflicts continue to arise over the separation of powers between the various branches of our Government, and this case is another example of that conflict. However, because of the grave national interests which are at stake, it is important that it be this Court which determines whether Congress, or as RLEA submits, the reorganization court has overstepped its bounds.

Shortly after the Rock Island reorganization court in January 1980 ordered that carrier to be liquidated, Congress began to examine the crisis caused by that decision to our nation's rail system, and it concluded, as have both Congresses and the courts for the past half-century, that it was vital to our national interests that Rock Island employees not be left destitute, but, rather, that their interests be considered and be protected by the reorganization court. *See generally,* 126 Cong. Rec. H8619 (September 9, 1980). Congress, appellant RLEA submits, had provided such protections when in passing

Section 17(a) of the MRRA, 45 U.S.C. §915(a), it required the reorganization court to provide adequate protection for employees in authorizing *any* abandonment.

Because of questions which began to develop over whether the reorganization court would comply with that statutory directive, Congress provided in Sections 106 and 110 of RITA a compromise which it believed would assure prompt and certain protection for employees while litigation over the protections afforded by Section 17(a) of the MRRA, was prosecuted. H. Rpt. No. 96-839, *supra*, at 22-23. That compromise was enacted, for as Congress found in Section 102 of RITA the Congressional Findings:

> Sec. 102 (a) Congress hereby finds that:
>
> > (1) uninterrupted continuation of services over Rock Island lines is dependent on adequate employee protection provisions covering Rock Island Railroad employees who are not hired by other railroads;
> >
> > (2) for those Rock Island Railroad employees not hired by other rail carriers, there is no other practicable means of obtaning funds to meet the necessary costs of such employee protection that are assumed by the Rock Island Railroad.
> >
> > (3) a cessation of necessary operations of the Rock Island Railroad would have serious repercussions on the economics of the States in which such railroad principally operates; and
> >
> > (4) premature cessation of services over lines which are the subject of pending purchase application [*sic*] would result in harm to the shipping public and could imperil continuation of vital commuter service.

45 U.S.C. §1001(a). An examination of Section 106 of the Act clearly shows that Congress believed the im-

plementation of an arrangement to protect CRI employees must be accomplished expeditiously; payments to Rock Island employees should "be made forthwith, notwithstanding any ensuing litigation concerning such payments. Conference Report to accompany S.2253, H. Rpt. No. 96-1041, *supra*, at 26.

The District Court, however, had a different view of the balance to be struck between the rights of the public and the rights of the creditors and estate in the crisis confronting the Rock Island, and three (3) days after RITA was enacted, it concluded when it authorized the abandonment of the entire Rock Island that employees were to be left unprotected. It was that conclusion, as well as its conclusion that the public interest was no longer a concern of the Rock Island estate (Appendix D at 18a-19a), which formed the basis for the injunction of June 9, 1980. But by insisting that its view of the unimportance of the public interest in this case was correct, the court has totally frustrated the basic intent of Sections 106 and 110 of RITA, and has undermined the successful transition of Rock Island service which Congress has so carefully planned in RITA.

Appellant RLEA respectfully submits that the very act of declaring such a vital Act of Congress unconstitutional and preliminary enjoining its enforcement without rendering a precisely detailed opinion describing the constitutional errors perceived in that Act, presents a substantial question which warrants plenary review by this Court. Surely federal courts must detail where they believe Congress erred in order that Congress could, if it deems the subject important enough, remedy the problem by new legislation. *See*, 126 Cong. Rec. H8618-19 (September 9, 1980). The open ended nature of the District Court's opinion in this case woefully fails to give that aid.

2. Another reason for granting plenary review in this appeal is the fact that the preliminary injunction in this case conflicts with prior rulings of this Court, in particular the decision in the *Regional Rail Reorganization Act Cases* [hereinafter, "*Rail Act Cases*"], 419 U.S. 102 (1974). It is a well accepted maxim of statutory construction that a court should not declare an Act of Congress unconstitutional unless no other reasonable construction of the statute is possible. *E.g., Rail Act Cases,* 419 U.S. at 134. Moreover, it is but a corollary of that doctrine that where a court may decide a case without reaching the constitutional issue, it should take that approach. *Id.* at 145-46, 158. Those principles, appellant RLEA submits, were totally disregarded by the District Court in this case when it summarily enjoined for constitutional reasons an Act which Congress declared to be essential to our nation's rail transportation system. Also, it did so without carefully examining whether appellant, appellees, or the public would be irreparably injured if the Act were enjoined. That error by itself, appellant RLEA submits, is sufficient to warrant a full review and a reversal of the judgment below. Moreover, the District Court also erred in concluding on the merits that Section 106 and 110 of RITA were constitutionally infirm.

The principal constitutional defect which the District Court believed existed in Sections 106 and 110 of RITA was the requirement in those sections that the Rock Island estate provide protection for its employees. As the court noted: "That Congress believes that it can legislate a $75 million labor protection burden on the assets of the Rock Island comes to me as a startling concept." Tr. of June 9, 1980, at 4; Appendix B at 7a. Since, according to the court, the public interest no longer was a factor to be considered in the Rock Island

reorganization, Congress had no authority to prescribe a protective arrangement to protect employees who were affected by the liquidation of the railroad. *Id.* And if it did require such an arrangement, it could not do so at the expense of the estate. *Id.* at 4-5, Appendix B at 6a-7a.

An immediate and glaring error of that reasoning is that the public interest is still an integral part of the Rock Island reorganization proceeding since the only jurisdiction which that court has over the Rock Island comes from Section 77 of the Bankruptcy Act, 11 U.S.C. §205. It is beyond question that the public interest is an essential ingredient of any action by a reorganization court pursuant to the jurisdiction conferred by Section 77. *New Haven Inclusion Cases,* 399 U.S. 392, 431 (1970). Even though the District Court believes it is liquidating the debtor, Section 77 does not give it that power, especially in the circumstances of this case where it has made no provision for continued rail service (*e.g., In re Lehigh Valley R.,* 558 F.2d 137 (3rd Cir. 1977)), and consequently, it should be clear that the public interest remains a primary concern in the proceeding.

But even accepting *arguendo* the CRI court's erroneous premise for its ruling, it is also beyond question that Congress, in the exercise of its powers under the Commerce Clause (Art. I, §8, cl. 3, U.S. CONST.) has the absolute right to regulate the terms or requirements of entry and exit from interstate railroad operations. *E.g.,* 49 U.S.C. §§10901, 10903. One such requirement which has been well recognized since at least as long ago as the enactment of the Emergency Railroad Transportation Act of 1933, 48 Stat. 211 (1933), is that the interests of employees must be taken into consideration and protected. *E.g., United States* v. *Lowden,* 308 U.S. 225 (1939). That requirement specifically applies to

abandonments of operations by a rail carrier, *e.g.*, *ICC v. Railway Labor Executives' Association*, 315 U.S. 373, 377-78 (1942), and in 1976 that requirement was made mandatory by the Congress in Section 802 of the Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. No. 94-210, codified as 49 U.S.C. §10903(b) (2).[4] When Congress in Sections 5(a) and 17(a) of the MRRA, 45 U.S.C. §§904(a), 915(a), gave Section 77 reorganization courts the power to authorize abandonments, it did so with the specific admonition that:

> In authorizing any abandonment pursuant to this section, the court shall require the carrier to provide a fair arrangement at least as protective of the interests of employees as that required under [49 U.S.C. §11347] . . . .

45 U.S.C. §915(a).

While the Rock Island reorganization court refused to impose provisions to protect employees when it authorized an abandonment of the CRI system,[5] it made that decision *after* RITA was enacted and its provisions had become effective. Consequently, it cannot validly be maintained that the imposition by Congress of a requirement that the Rock Island provide employee protection was either beyond Congress' powers or in violation of due process since Section 106 merely quantified a potentially larger debt of the estate, and provided a com-

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[4] The Commission, relying upon language in a conference report to that legislation, has concluded that it still retains discretion in an entire line abandonment case to refuse to impose employee protections. *E.g.*, *Wellsville, A. & G. R.—Abandonment*, 354 I.C.C 744 (1978); *but see*. H. Rpt. No. 96-839, *supra*, at 63-66.

[5] The court concluded that Section 17(a), as well as its employee protection requirement, were not applicable to its ruling "confirming" the abandonment of the Rock Island.

promise for a troublesome question which has strong public interest considerations. *See,* H. Rept. No. 96-839, *supra,* at 22-23; *accord, Ecker* v. *Western Pac. R.,* 318 U.S. 448, 468 (1943).

But even if the court was correct that the imposition of the arrangement required by Section 106 of RITA would be a taking for public purposes without compensation, that conclusion does not lead to the further conclusion that the taking is unconstitutional so as to render Section 106 enjoinable. This Court has previously observed that a statute can be saved from unconstitutionality by the Tucker Act, 28 U.S.C. §1491. *E.g., Rail Act Cases,* 419 U.S. at 126-27. And unless Congress has expressly withdrawn that remedy, it should be found to be available if there is a potential constitutional question about the validity of an Act. *Id.* at 126. Since the availability of the Tucker Act is crucial to a conclusion that either the estate or the creditors would be irreparably harmed by RITA, it was encumbant upon the Court to decide that question at the same time that it concluded that the Act was otherwise unconstitutional.

3. A third reason why this appeal presents substantial questions which warrant plenary review is that the court below took the grave step of declaring an Act of Congress unconstitutional without carefully or accurately balancing the equities involved. An examination of the facts in this case shows that the potential harm to appellees from a denial of the injunctive request is not irreparable as a matter of law, and that the court therefore abused its discretion in granting the injunction.

Justices of this Court have recognized before that "statutes are presumptively constitutional and, absent

compelling equities on the other side . . ., should remain in effect pending a final decision on the merits by this Court." *New Motor Vehicle Board* v. *Orrin W. Fox Co.*, 434 U.S. 1345, 1352 (1977) (Rehnquist, J.; in chambers); *accord, Williams* v. *Zbaraz*, 442 U.S. 1309, 1312 (1979) (Stevens, J.; in chambers). In this case, appellant RLEA submits, appellees cannot show that there are compelling equities on their side to continue the injunction in effect, and due to the clear injury to the employees represented by appellant and to the public, the injunction should never have been issued.

Appellees Trustee and Creditors have asserted below that an injunction was necessary to prevent the beginning of the process called for by Section 106 of RITA because once underway that process would deny them due process of law by virtue of the expedited review procedures of Section 106(d)(2); and since implementation of the arrangement could not be stayed pending that review, they could be subject to an unconstitutional deprivation of property. Although the Rock Island reorganization court did not enter any specific findings of fact detailing what, if any, irreparable harm required the issuance of an injunction (*see*, Rules 65(b) and (d), Fed. R. Civ. P.), a review of the Court's oral opinion shows that the preceived harm involved both a potential unconstitutional taking (Appendix B at 7a), and a presumed denial of procedural due process by being required to submit to the administrative processes under Section 106(b), and by being denied a right to have the reorganization court examine the arrangement imposed thereby. Appellant RLEA respectfully submits that neither assertion of potential injury amounts to irreparable harm.

Section 106, it is submitted, does not unconstitutionally deprive appellees of their property since

employee protection has always been a potential liability of the estate. But even if it were potentially unconstitutional, the immediate payment of funds for employee protection is not irreparable since Congress has provided that the estate could borrow such funds on the basis of the government's guarantee. Section 110 of RITA, 45 U.S.C. §1008. If it is determined subsequently that the priority accorded to the obligations under Sections 106 and 110 are unconstitutional, the estate and the creditors will not be harmed because "if it turns out that the $75 million of claims have been given an unconstitutional preference, then the government's loan will be relegated to its proper priority under the reorganization plan." *In re Chicago, M, ST.P. & P. R.*, N.D. Ill. No. 77 B 8999, Order No. 286 at 9. Moreover, if as appellant submits, the Tucker Act remedy is also available, it is legally impossible for the Trustee and creditors to allege irreparable harm from an unlawful disbursement of funds during a processing of an appeal under Section 106(d)(2) of the Act.

Appellees fears that they will be denied procedural due process by being required to allow the ICC to consider an appropriate employee protective arrangement under Section 106(b) are, to say the least, frivolous. It is axiomatic that being required to submit to an administrative process does not amount to irreparable harm. *E.g., Renegotiation Board* v. *Bannercraft Clothing Co.*, 415 U.S. 1 (1973); *accord, New Motor Vehicle Board,* v. *Orrin W. Fox Co., supra.* Moreover, it is entirely consistent with our judicial system to require appellees to submit to those processes during an appeal. *E.g., New York Times Co.* v. *Jascalevich,* 439 U.S. 1304 (1978) (Marshall, J., in chambers). Thus, appellees could not show that they would suffer any harm whatsoever by a denial of their injunctive request,

thereby permitting the ICC to assume jurisdiction under Section 106(b) to begin its deliberations, and then to allow appellate review under Section 106(d)(2).

Also, the District Court's conclusion at page 12 of its oral decision of June 9, 1980 (Appendix B at 11a), that irreparable harm would be sustained by allowing the expedited appellate review procedures of Section 106(d)(2) and the no-stay provisions of Section 106(d)(1) to be triggered, is without merit. In the first place, Congress intended any question over the legality of Section 106 to be resolved expeditiously and it cannot be said at this stage of the proceedings that such an expedited appellate period of sixty (60) days will deprive any party of due process, especially since the District Court believed it could make such a determination in only four days. *E.g., Rail Act Cases,* 419 U.S. at 158; *Yakus* v. *United States,* 321 U.S. 414 (1944). And secondly, as a practical matter, it is very unlikely that the administrative processes necessary to promulgate regulations under Sections 106(e)(1) and 114 of the Act, and to fund the arrangement under the loan guarantee procedures of Section 110 will be concluded much before an appellate decision is rendered. A similar loan guarantee procedure under Sections 9 and 15 of the MRRA for the Milwauukee took fifty-six (56) days from the date the application was received until the guarantee agreement was entered into. Since it took that long to fund a similar arrangement with a cooperative and willing Trustee, it is very probably that it will take at least as long, if not longer, in this case. Any payments in the interim from the corpus of the estate, of course, would be recoverable under the Tucker Act if it is subsequently determined that the arrangement was unlawful.

CONCLUSION

For these reasons, this Court should note probable jurisdiction of this appeal.

RESPECTFULLY SUBMITTED,

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Attorneys for Railway Labor Executives' Association

Dated: September 15, 1980

APPENDIX

APPENDIX A

Portions Of Rock Island Transition And Employee Assistance Act, Pub. L. No. 96-254

1) 45 U.S.C. §1005

Employee Protective Agreement

Sec. 106.(a) No later than 10 days after the date of enactment of this Act, in order to avoid disruption of rail service and undue displacement of employees, the Rock Island Railroad and labor organizations representing the employees of such railroad, with the assistance of the National Mediation Board, may enter into an agreement providing protection for employees of such railroad who are adversely affected as a result of a reduction in service by such railroad. Such employee protection may include, but need not be limited to, employee relocation incentive compensation, moving expenses, and separation allowances.

(b) If the Rock Island Railroad and the labor organizations representing the employees of such railroad are unable to enter into an employee protection agreement under subsection (a) of this section within 10 days after the date of enactment of this Act, the parties shall immediately submit the matter to the Commission. The Commission shall impose upon the parties by appropriate order a fair and equitable arrangement with respect to employee protection not later than 30 days after the date of enactment of this Act, unless the Rock Island Railroad and the authorized representatives of its employees have by then entered into a labor protection agreement. For purposes of this subsection, the term "fair and equitable" means no less protective of the interest of employees than protection afforded under section 9 of the Milwaukee Railroad Restructuring Act (45 U.S.C. 908), subject to the limitations set forth in section 110 of this title.

(c) If an employee protection arrangement is imposed by the Commission under subsection (b) of this section, the bankruptcy court shall immediately authorize and direct the Rock Island Railroad trustee to, and the Rock Island

Railroad trustee and the labor organizations representing the employees of the railroad shall, immediately implement such arrangement.

(d)(1) An order of the Commission under subsection (b) of this section may not be stayed by the Commission or by any court, and an order of the bankruptcy court under subsection (c) of this section may not be stayed by any other court.

(2) Any order described in paragraph (1) of this subsection may be appealed only to the court of appeals of the United States having jurisdiction to review decisions and orders of the bankruptcy court. Any such appeal to such court of appeals shall be filed within 5 days after the date of entry of the order of the Commission or the bankruptcy court, as the case may be, and such court of appeals shall finally determine such appeal within 60 days after the date such appeal is filed. No determination by the court of appeals under this subsection may be reviewed in any other court.

(e)(1) Any claim of an employee for benefits and allowances under an employee protection agreement or arrangement entered into under this section shall be filed with the Board in such time and manner as the Board by regulation shall prescribe. The Board shall determine the amount for which such employee is eligible under such agreement or arrangement and shall certify such amount to the Rock Island Railroad for payment.

(2) Benefits and allowances under such agreement or arrangement entered into under this section shall be paid by the Rock Island Railroad from its own assets or in accordance with section 110 of this title, and claims of employees for such benefits and allowances shall be treated as administrative expenses of the estate of the Rock Island Railroad.

(f) The first sentence of section 7(b)(7) of the Railroad Retirement Act of 1974 (45 U.S.C. 231f(b)(7) is amended by striking out "and the Milwaukee Railroad Restructuring Act"

and inserting in lieu thereof ", the Milwaukee Railroad Restructuring Act, and the Rock Island Railroad Transition and Employee Assistance Act".

2) 45. U.S.C. §1008

OBLIGATION GUARANTEES

Sec. 110(a) The Secretary, under the authority of section 511 of the Railroad Revitalization and Regulatory Reform Act of 1976 (45 U.S.C. 831), shall guarantee obligations of the Rock Island Railroad for purposes of providing employee protection in accordance with the terms of any employee protection agreement or arrangement entered into under section 106 of this title.

(b) Any obligation guaranteed pursuant to this section shall be treated as an administrative expense of the estate of the Rock Island Railroad.

(c) The aggregate unpaid principal amount of obligations which may be guaranteed by the Secretary pursuant to this section shall not exceed $75,000,000.

(d) The total liability of the Rock Island Railroad in connection with benefits and allowances provided under any employee protection agreement or arrangement entered into under section 106 of this title shall not exceed $75,000,000.

(e) Except in connection with obligations guaranteed under this section, the United States shall incur no liability in connection with any employee protection agreement or arrangement entered into under section 106 of this title.

(f) Section 511(g) and section 516 of the Railroad Revitalization and Regulatory Reform Act of 1976 (45 U.S.C. 831(g) and 836) shall not apply to any obligation guaranteed under this section.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

IN THE MATTER OF:

CHICAGO, ROCK ISLAND & PACIFIC RAILROAD COMPANY,
Debtor.

Partial Transcript Of Proceedings

had in the above-entitled matter before the HONORABLE FRANK J. MCGARR, one of the Judges of said Court, in his courtroom, in the United States Courthouse, Chicago, Illinois, on Monday the 9th day of June, 1980, at the hour of 10:00 o'clock a.m.

THE COURT: I don't think a response will be necessary, in light of the time, as we've gone well into the lunch hour. I have a matter at 2:00 o'clock that will take all afternoon. I indicated at the conclusion of the argument I would indicate my ruling on the application filed by the Trustee and the creditors this morning, it's my intention now to do so, if I can get the many notes I made in some form of order.

It's of no news to anybody here interested in this case that for well over four years, closer to five years, I guess, I have been trying to balance the public interest against the rights of the creditors, that I have sanctioned the continued operations of the Rock Island towards the end of an anticipated and hoped for reorganization. Events indicated down the line, and I accepted as inevitable, the fact that that effort had and would continue to fail, and therefore recently, in view of that conclusion, I ordered the termination of operations and the abandonment of the Rock Island operation. The Commerce Commission agreed with me, and after hearing that, I entered the final order, and we do not now have before us, for any consideration, an operating railroad.

The basic thrust and historical mission of the Commerce Commission is to oversee the operations of railroads, not

their liquidation, and to oversee the terms and conditions in this case of contracts entered into with other railroads to continue to operate segments of the Rock Island, if any such agreement is reached. This jurisdiction, however, is basically over the new operating entity, the Rock Island not being an operating entity.

I have before me today an application for a declaratory judgment that has to do with a statute recently enacted and an attack upon its constitutionality, and in argument there has been adverted to, and I have in front of me, the text of the preamble to that statute, the Rock Island, Section 102, and the preamble indicates the pursuit of Congress of the interest of seeking the uninterrupted continuation of services over Rock Island lines, dependent as it is, and I'm not reading, I'm paraphrasing, an adequate employee protection provision, covering Rock Island Railroad employees who are not hired by other railroads.

There is in that, and the following three paragraphs of the preamble, a basic illogic, a basic contradiction which I'm at a loss to understand. What the statute addresses itself to is labor protection for those employees who will not be absorbed by whatever segments of the Rock Island are continuing to operate, and therefore the purpose of uninterrupted continuation of services over Rock Island Lines, as part of the preamble to this statute, remains to those persons arguing it, and to me, something of a mystery. The important thing to remember is that whatever public purpose and public interest there remains in this case is the problem of the other carriers and the Interstate Commerce Commission and the on-going supervision by the I.C.C. of the operations of the other carriers over Rock Island Lines that they may have acquired. But, the Rock Island is a bankrupt corporation with no more operations, nothing left but assets and creditors and liquidation. Whatever obligations it may have to labor, it must arrive out of a contract that it had with labor, and any appropriate claims of labor under existing bankruptcy law is under the Railroad Retirement Act or any other statute which

operates to fix the rights of labor. There are pension rights, I assume, there may be wage claims that can be resolved. But, these are all based upon existing law, existing rights, existing contracts, and that Congress believes that it can legislate a $75 million labor protection burden on the assets of the Rock Island comes to me as a startling concept. That the Government will lend or the FRA will lend the $75 million is irrelevant in face of the fact that obviously that becomes a claim against the Estate in derogation of the rights of the creditors in whatever assets the Estate now has.

I'm not aware that it has ever been held that Congress can single out a private industry in bankruptcy and legislate for this single company only labor-management rights. I'm aware that in the Milwaukee Act something of that nature seems to have been done. I'm not sure that I agree with Judge McMillen and his conclusions, but neither do I disagree, because his situation is so different than the one before me that I don't find it analogous. The Milwaukee continues to operate, the Milwaukee has problems the Rock Island doesn't have, and the Milwaukee is in a situation the Rock Island is not in.

It seems to me clear, without the necessity of a great deal of argument, that the Rock Island Act, which is the subject of our deliberations today, is an unconstitutional taking, an unconstitutional deprivation of the property rights of the creditors. It seems to be thus in two respects at least, and probably more, but the labor protection aspect of it, which has been argued today at some length, and in addition, the curious procedural deprivation of the ordinary rights of adjudication and appeal of decision affecting the property rights of creditors in a bankruptcy case.

The labor protection scheme, however, is central to the legislation, and its infirmities are sufficient basis for the ruling that I intend to make today. But, while this is true, there are other aspects of the legislation that I have adverted to of dubious constitutionality. One I have mentioned is the strangely trunkated appellate procedure. The second, in-

cluding the deprivation of the Trustee and the Court and the creditors of their control over and their rights in the Commuter Service for the extended period of two years. This and other problems remain for further consideration. However, and as I've said, the labor protection plan is the central issue of this morning's argument and this morning's determination, and it is enough to warrant the intrustion [*sic*] of the Court into this implementation of this statutory program on constituional grounds.

I have no lack of faith in the ability of the Seventh Circuit to decide the constituional issues here. My reservatins, however, are as to the procedural anomalies which this statute emobidies, setting the matter, apparently in the interest of speed and expedition, upon an exceedingly fast track, which puts a bankruptcy matter in the hands of the I.C.C., expert by definition only in terms of railroad operations, and bypasses the Court which has the primary jurisdiction over bankruptcy matters. The Seventh Circuit, in any event, will review this matter one way or another, and I would not wish it otherwise, but it will only be after an order of this Court barring the intent of this legislation to impose this significant obligation on a bankrupt estate with a statute by-passing the jurisdiction of the Bankruptcy Court in which the case is pending.

Let me comment for a moment on some of the arguments that have been made in opposition to the application of the creditors and the Trustee. Mr. Broadley and Mr. Rush have argued that it would be appropriate for the Court to let the Trustee respond to the I.C.C.'s request for information, allowing the Commerce Commission to thus formulate the issues and work out a labor protection plan which in the argument of Mr. Broadley, I think it was, might be acceptable to the Court and the Trustee. I know that was Mr. Rush's argument. It might even be much less than the $75 million, it might be $50 million or $25 million. The issues [*sic*] is not whether the I.C.C. can arrive at a labor protection plan which the creditors and the Trustee could live with, even

if that plan were to cost the Estate only $1 million. The issue is whether ab initio, the concept of a compelled labor protection plan, paid for out of the Estate, whatever the plan, has any constitutional sanction. We don't have to wait for an I.C.C. determination of the details of the plan to determine that issue.

Mr. Broadley has argued the Lowden case, the Old Rock Island case, a reorganized railroad continuing operations, and that, of course, that phrase, "continuing operations," is the reason why the Lowden case is not applicable here. In its continuing operations after its earlier reorganization, those continuing operations invoked the continuing jurisdiction of the Commerce Commission. The uniqueness of the situation here is that the Rock Island is not a railroad corporation any longer, it's not an operating railroad, it's a corporation in the business of liquidating real estate and equipment and paying off creditors. The environment of labor protection decisions and precedent and all of the Court's decisions and precedent flowing therefrom has always been the environment of an operating railroad, and that is singularly the environment we no longer have here.

Mr. Clarke argues that there is no more public interest, or there is no more public interest here because, at least within the discretion of the Court, because the legislature, the ultimate repository of decisions on public interest, has spoken and decided what the public interest is. If Congress sees public interest, of course, Congress may serve that public interest by appropriate legislation which does so with public funds. One of the central issues in this case is and always has been and will be and will continue to be to what extent the private sector, here the creditors and the bondholders, can be saddled with the public interest. Congress may determine public interest, but Congress may not take private property to serve the public interest.

I find that we have an emergency here, there is irreparable harm to the Rock Island and the creditors if this procedure mandated by the Rock Island Act goes forward,

that the probability of determination of unconstitutionality of this Act after more mature consideration and deliberations is exceedingly great, and that all the statutory and traditional requirements for emergency relief have been met. The emergency relief sought in the petition before me in Paragraph 1 is a temporary restraining order and a preliminary injunction restraining the Commission from asserting jurisdiction to consider or impose labor protection arrangements as provided by the Rock Island Act; an order on the Trustee not to enter into these negotiations as provided by the Act and requested by the Commerce Commission; and a preliminary injunction restraining the United States Secretary of Transportation from going ahead with the statutorily authorized $75 million loan and consequent obligations on the Rock Island that would flow out of the making of that loan.

Because of the apparent unconstitutionality of this Act, I think this relief is warranted, and its effectuation and implementation must be enjoined, and therefore I will enter an order granting the prayers for relief that I have just summarized in the petition of the Rock Island Railroad, Trustee and the creditors. This is a preliminary injunction, I see no need for a temporary restraining order. I think in the issue of constitutionality of an Act, which we can all read and argue, a temporary restraining order is not necessary and a preliminary injunction is the order I intend to enter. This, among other things, opens the avenue of appealability, which I think is probably desirable in this case.

I will continue the matter for further argument and further report on the preliminary injunction and for a determination of whether, after I hear whatever additional you have to present, it should be transmuted into a permanent injunction, a final injunctive order and will grant some time for that. I would expect, however, that before that time there will be a movement in the direction of the Court of Appeals, which is why I have made it a preliminary injunction and an appealable order.

I think the way to finalize this is to draw an order which merely contains the prayers for relief in the plaintiff's motion for a preliminary injunction, which I have indicated I'm ready to grant, so I will merely dictate an order which will be available to you gentlemen before the end of the day embodying those three requests for relief and putting them in order form rather than in prayer form.

Is there anything further, gentlemen, that remains to be done?

MR. CLARKE: Your Honor, there's one matter, and that's a question of whether or not in light of the fact that there is no money needed from the Estate for the next 20 days at least, that your Honor stay your order at this time to allow the Interstate Commerce Commission to consider the issue under Section 106(b) of the Act.

THE COURT: Well, actually that's been the thrust of the argument, Mr. Clarke, and Mr. Broadley, Mr. Rush having argued that no harm will be done by the implementation of this Act, and I have not agreed with that, I don't share their views on the subject. I think that the Act is designed, despite argument to the contrary, to take jurisdiction over this matter away from the Bankruptcy Court, that the Commission is to make its determinations appealable only to the Court of Appeals, that I have no role in that and I think that's one of the unconstitutional aspects of the statute. It has been argued that when all of this has been done, the Trustee will have to come to me for an order approving whatever it is that the Commerce Commission has told him to do. I do not so read the Act, I don't think that's what it says, and therefore to grant your request would merely be to allow to go forward what I have just enjoined, and therefore I deny that motion.

Mr. Broadley, what—

MR. BROADLEY: I was just going to join him in a motion for a stay.

THE COURT: I'll deny the motion for a stay. Gentlemen, I'll get an order out as quickly as I can so all of you have something to go to the Court of Appeals with.

Counsel, you arrived belatedly and you haven't heard most of this. What have you got today?

MR. SCHNEIDERMAN. Your Honor, as I read the draft T.R.O. that was in the papers that we received on Friday afternoon, and as I heard your Honor's statement of what the order would be, do I understand that there is nothing in that order, either requested or entered, that effects the Commuter Service immediately?

THE COURT: That's correct, counsel, I adverted to the fact that that aspect of the statute might be subject to some further scrutiny, but there's not [*sic*] order affecting the Commuter Service entered at this time.

MR. SCHNEIDERMAN: Thank you, your Honor.

THE COURT: Thank you. That will be all, gentlemen.

(WHICH WERE ALL OF THE PROCEEDINGS HAD IN THE ABOVE-ENTITLED MATTER ON THE DAY AND DATE AFORESAID.)

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 75 B 2697

In the Matter of

CHICAGO, ROCK ISLAND & PACIFIC RAILROAD COMPANY, *Debtor,*

WILLIAM M. GIBBONS, as Trustee of the Chicago, Rock Island and Pacific Railroad Company, Debtor; CONTINENTAL ILLINOIS NATIONAL BANK AND TRUST COMPANY OF CHICAGO, as Indenture Trustee; THE FIRST NATIONAL BANK OF CHICAGO, as Indenture Trustee; and HENRY CROWN, ET AL., *Plaintiffs,*

v.

THE UNITED STATES OF AMERICA; THE INTERSTATE COMMERCE COMMISSION; AND NEIL GOLDSCHMIDT, United States Secretary of Transportation, *Defendants.*

PRELIMINARY INJUNCTION

This matter is before the court on the joint motion of the trustee and creditors of the estate of the Chicago, Rock Island and Pacific Railroad Company. The trustee and creditors have filed a complaint for a declaratory judgment and injunctive relief declaring the Rock Island Railroad Transition and Employee Assistance Act ("the Rock Island Act") (a copy of which is found in H.R. Rep. No. 96-1041, _____Cong. Rec.-House, H3875 (May 20, 1980)) unconstitutional and enjoining its enforcement. The court has reviewed the complaint and motion and their supporting documents and memoranda. In addition, the court has heard arguments of all interested parties.

Pursuant to the requests for relief in the written filings and the arguments of counsel, the court made oral findings from the bench at the conclusion of the arguments heard this

day. Those findings need not be restated here. However, pursuant thereto, the court orders the issuance of a preliminary injunction:

1) preliminary enjoining the Interstate Commerce Commission from asserting jurisdiction to consider or to impose any labor protection arrangement or obligation under the Rock Island Act; and

2) preliminarily enjoining the Trustee, William M. Gibbons, from entering into negotiations respecting any labor protection agreement and from implementing any such labor protection agreement under the Rock Island Act; and

3) preliminarily enjoining the United States Secretary of Transportation from requesting, approving or guaranteeing any loan or obligation on the estate of the Chicago, Rock Island and Pacific Railroad Company under the provisions of the Rock Island Act.

ENTER:

FRANK MCGARR
United States District Judge

Dated: June 9, 1980

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 75 B 2697

IN THE MATTER OF:

CHICAGO, ROCK ISLAND & PACIFIC RAILROAD COMPANY,
Debtor.

TRANSCRIPT OF PROCEEDINGS ON MOTION TO RECONSIDER PRELIMINARY INJUNCTION

had in the above-entitled matter before the HONORABLE FRANK J. MCGARR, one of the Judges of said Court, in his courtroom in the United States Courthouse, Chicago, Illinois, on Friday, the 20th day of June, 1980, at the hour of 10:00 o'clock a.m.

[Pages 49-59]

THE COURT: The circumstances of this case, in its leaping from crisis to crisis, which seems to be its history, has frequently compelled the litigants to come in, as they did earlier this week, and also as they did last week and today, in order to address emergencies where there is very little time involved, and that has necessarily compelled me to respond in kind, so that I'm constantly issuing opinions orally from the bench after listening to arguments of counsel and after a brief chance, usually overnight, to read some of the very excellent briefs that I've been supplied with.

It occurs to me that I should be embarrassed that every record that goes to the Court of Appeals, instead of presenting that I would hope to be my reasoned and literate opinion, is going up sort of off the cuff on findings and conclusions that the circumstances mandate. But, I guess that's the way it has to be.

In order to illuminate, as best I can, the reasons for the ruling which I intend to announce on this motion, I'd like to

make some general comments both on the background of the issue and the issues themselves as they're raised.

I did this the last time, I don't know how well it turned out, but, as I said, the exigencies of time are such that it seems to be the best way to do it.

I've heard a lot of reference today, and always in this case, to the public interest, and Mr. Clarke now argues that it was in the public interest to avoid the harsh consequences upon those terminated employees of the Rock Island which he sees implicit in my order. And it's the argument of the Government that the public interest, which lies generally in the capable hands of the Commerce Commission, is where the public interest should remain and that they should obey the mandate of Congress and implement the plan which Congress so obviously in the public interest wants them to do.

The creditors have listened to the public interest argument for five years and I imagine they grew fairly tired of it fairly early in the game, because, as always, I have tried in this case to balance the public interest against the private rights of the creditors, and one must do that in a case involving a public utility such a railroad, and which one never does in any other type of a bankruptcy case because it's so extraordinary that it can be argued that the private right of contract can be effected [*sic*] by the public interest to the extent that it has been in this case.

But, the public interest has many aspects. There was always, in the long life of this case, a strong public interest in the continued operation of the Railroad. We came to a time in the case when even the Commerce Commission abandoned that, as did I.

There has always been an employees' interest. No court ever takes lightly the signing of an order, the issuance of an order that threatens unemployment of a very large number of people, so the employees' interest has been determinative and paramont, and that combination of the public interest and the employees' interest gave the Rock Island five years of

operation and the employees five years of employment, which had a different view been taken of the public interest vis a vis the creditors' interest, they might not have had.

As to the creditors' interest, which is contrary to the public interest in this case, we have reached that stage in the administration of the Rock Island where since it's no longer an operating Railroad, it's the creditors' interests that are now paramont and and must be served.

I'd like to characterize those creditors for a moment. We are tempted to think of the creditors in this case, because they have been active in the case as banks and bondholders and so forth, but my desk is piled high with letters that I have been receiving for many, many months from small businesses and small taking authorities and school districts and from all through the Middle West and the area that the Rock Island serves, telling tales of extreme hardship that have been occasioned by the failure and inability of the Rock Island to pay its bills. These are not giants, they're not banks. They're people upon whom the hardships of the abandonment of the service of the Rock Island and its bankruptcy falls every bit as harshly as the same problems fall on the employees.

What I'm really trying to say, I suppose, is that everyone is this case, as is natural and as is human, approaches it from a single point of view, and I am charged with and have tried hard to see every issue in this case in the light of all of these interests and points of view which I have just discussed.

The statute that we're dealing with today, the Rock Island Transition Act, to give it a shorthand name, exudes concern for expedition, and it is in that atmosphere that this entire proceeding concerning it has taken place. We have moved rapidly, we have tried to do things rapidly and set up possibilities of appeal rapidly for the reason that the issues are vital and important and all these interests are involved and rapid determination of what must be determined seemed to be in order.

In the order that is the subject of today's petition, I did not, in so many words, adjudicate the unconstitutionality of the Rock Island Transition Act, although my remarks indicated that I certainly believed that it was probably that that would be the ultimate conclusion of the Court were we to go down the route to the final injunctive order. But, I did enter a preliminary injunction prohibiting its implementation on the grounds that we had a genuine emergency, that we had irreparable injury and that we had a reasonable probability of the plaintiffs' success on the arguments as to the unconstitutionality of the Act, in both its substance and in the procedures which it set up.

The unconstitutional aspect of the taking of private property to fund a legislatively created special benefits program for the terminated employees remains, in my mind, after all the argument that I have heard today, still the most single valid constitutional argument addressed to the Rock Island Transition Act. The Rock Island as an operating railroad was suffused with the public interest. But, the Rock Island as a non operating former railroad has lost that character, and therefore, Congress, their approach to it, to the public interest seems to me to misapprehend the fact that what they are dealing with is a private business with a lot of creditors which own some property and which is being liquidated for the benefit of creditors, and that it is not an operating railroad and that the public interest is no longer paramont and that the employees of the railroad, regrettable as it is, are former employees of the Railroad.

Among the rationals that have been developed to justify Government intervention into railroading over the years has been the public interest and peaceful labor relations, and the public interest in the necessity to keep an operating railroad operating. The operating railroad aspect is now gone as a factual basis for the interest of Congress, and if Congress had a sufficiently legitimate public interest in peaceful labor relations, as it asserts, and as it has been argued, as a foundation for what it has done, nothing justifies Congress satisfying the

public interest in peaceful labor relations by the taking of private property. The public interest, if it is a real public interest, must be served by public funds.

Mr. Clarke has argued that the money should be paid, the money provided by Congress and by this Act to come from this Estate, that it should be paid to the employees while the legal process goes foreward, and he argues that with some considerable persuasion. But in truth, the argument that the funds, if improperly paid, are recoverable under the Tucker Act is a specious argument and if the money is paid to the employees while the legal processes go foreward and if the constitutionality of the Act, or my decision on it, was correct, there is no doubt that there has been irreparable harm to the Estate of the Rock Island.

Neither is it certain in my mind that as a matter of law that I have the final and total control over the disbursement of the funds, as the Government argues, and therefore, I cannot accept that argument as a reliable predicate for the Court's conclusion that there is no irreparable harm possible in this case, because ultimately I will have the last say as to the disbursement of the funds.

With everybody concerned with expedition and everybody arguing for speed, it seems to me that it doesn't matter very much whether the constitutionality of this Act, which is the basic issue we're all concerned with, is adjudicated in the context of an appeal from my order of a week or so ago, or, as Mr. Rush would have it, after the I.C.C. implements the order and the Rock Island comes to me for an authorization to disburse the funds, which I might be expected to deny if I had the same opinion on constitutionality then as I do now. Or, as Mr. Clarke argues, that after the I.C.C. implements the program and gets set to disburse the funds, that if we handle the appeal expeditiously enough, we may get an order out the Appellate Court before we get the money out of the Rock Island.

All of those programs and all of those paths lead to the same conclusion, and that is the absolute necessity in the present posture of this case for an appellate determination of the validity of my tentative preliminary conclusion that the Act we are discussing in unconstitutional, and in a pragmatic way, it seems obvious to me that the best way to handle that is in an appeal from the order which I have already entered. The fastest way to resolve it is also in that appeal, and I suppose that's why it's the best way.

It is argued, and the Government is understandably concerned that there is confustion as to where that appeal should go, do we have a Seventh Circuit matter, or do we have a Supreme Court matter. I must confess that the issue is confusing to me and I'm not certain, although I'm sure that you gentlemen has given it much more study and thought than I have.

This is a problem created, however, by the Act itself, as I view it, in its attempt to tamper with the ordinary appellate process, and I say that Congress having created this problem, it leaves me no avenue to resolve it.

In summary, I think since Congress desired expedition here, I have raised questions as to the constitutinality of the legislative plan. The objectors say that there is no irreparable harm, and I disagree with them. If the Act is unconstitutional now, it will be no less unconstitutional after the I.C.C. implements its plan or after the funds are disbursed, if that's the way that it turns out, and I assume, therefore, that expedition is best served by an appeal from the order that I entered most recently and to allow the appellate determination from there.

So, with some considerable expression of sympathy for the employees of the Rock Island, and concern, and while I don't expect them to accept this, since nobody believes that you tell them something they don't want is for their own good, that even from the employees' point of view the most expeditious course is the one that I have just described and I have just announced.

Therefore, the motion of Messrs. Broadley, Rush and Clarke, or the motion joined in by all of them to vacate the injunctive order of June 9th is denied.

I guess that leaves you on your way to whatever court of appeals you decide you're going to, gentlemen. At least I hope you stay in touch with each other so you meet in the right court.

That will be the order on today's hearing.

MR. CLARKE: Your Honor, would it be possible to just ask one or two questions for clarification?

THE COURT: I'll do my best.

MR. CLARKE: Your Honor, am I correct in concluding that your Honor has concluded tentatively and it's that finding, the tentative finding of law that is the basis of your injunction that the statute is unconstitutional insofar as it requires the taking from the Estate?

THE COURT: It is unconstitutional for more than one reason, and that's one of them.

MR. CLARKE: So we do have a finding on the constitutionality?

THE COURT: Yes. All right, gentlemen—

MR. RUSH: Might I ask a question also, your Honor?

THE COURT: All right.

MR. RUSH: There's been so much argument about it that it becomes a matter of increasing concern as to whether in your June 2nd order you did in fact, as has been argued, intend to rule that the imposition of any labor protection on the Estate could not be done constitutionally, or whether—I guess I simply understood it as you simply held it wasn't required under Section 17 of the Milwaukee Restructuring Act.

THE COURT: I held originally that it was not required under Section 17 of the Milwaukee Restructuring Act. I added, and you have to always bear in mind that it was in the context of the ruling on an application for preliminary relief,

that it was my view that it was highly probable that the final outcome of the case would be that any imposition of labor protection by Congress on the Rock Island payable out of the Estate was an unconstitutional taking.

MR. RUSH: Thank you, sir.

THE COURT: All right, gentlemen.

(Which were all of the proceedings had in the above-entitled matter on the day and date aforesaid.)

APPENDIX E

In The United States District Court
For The Northern District Of Illinois
Eastern Division

No. 75 B 2697

In The Matter Of

CHICAGO, ROCK ISLAND & PACIFIC RAILROAD COMPANY,
Debtor.

In Proceedings for the Reorganization of a Railroad

Notice Of Appeal

Notice is hereby given that the Railway Labor Executives' Association, an intervenor herein, appeals to the Supreme Court of the United States from a Preliminary Injunction issued at 4:30 p.m. on June 9, 1980, by the United States District Court for the Northern District of Illinois sitting as a Regorganization Court for the Property of the Chicago, Rock Island & Pacific Railroad Company, by which the court, haing declared an act of Congress unconstitutional, enjoined the Interstate Commerce Commission, the Trustee and the Secretary of Transportation from performing their duties under Sections 106 and 110 of the Rock Island Transition and Employee Assistance Act, Pub. L. No. 95-254 [*sic*] (signed May 30, 1980). This appeal is being taken pursuant to 28 U.S.C. §1252.

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Attorneys for Railway Labor executives' Association

Dated: June 11, 1980

Certificate Of Service

I hereby certify that I have this day caused to be served a copy of the foregoing Notice of Appeal by mailing copies thereof with first-class postage prepaid and properly addressed to all parties on the Official Service List.

Dated at Washington, D.C., this 11th day of June, 1980.

JOHN O'B. CLARKE, JR.
John O'B. Clarke, Jr.

APPENDIX F

List of RLEA Member Organizations

American Railway Supervisors Association
American Trian Dispatchers Associaion
Brotherhood of Locomotive Engineers
Brotherhood of Maintenance of Way Employes
Brotherhood of Railroad Signalmen
Brotherhood of Railway, Airline and Steamship Clerks
Brotherhood Raiway Carmen of the United States and Canada
Hotel & Restaurant Employees & Bartenders International Union
International Association of Machinists and Aerospace Workers
International Brotherhood of Boilermakers and Blacksmiths
International Brotherhood of Electical Workers
International Brotherhood of Firemen & Oilers
International Longshoremen's Association
International Organizations of Masters, Mates and Pilots
National Marine Engineers Beneficial Association
Railroad Yardmasters of America
Railway Employes Department, AFL-CIO
Sheet Metal Workers' International Association
Seafarers International Union of North America
Transport Workers Union of America
United Transportation Union